

ORIGINAL



RECEIVED

2003 DEC 10 P 4:31

AZ CORP COMMISSION  
DOCUMENT CONTROL

**BEFORE THE ARIZONA CORPORATION COMMISSION**

MARC SPITZER  
Chairman  
WILLIAM A. MUNDELL  
Commissioner  
JEFF HATCH-MILLER  
Commissioner  
MIKE GLEASON  
Commissioner  
KRISTIN K. MAYES  
Commissioner

Arizona Corporation Commission  
**DOCKETED**

DEC 10 2003

DOCKETED BY

In the Matter of the Complaint )  
of Eschelon Telecom of Arizona, Inc. )  
Against Qwest Corporation )  
\_\_\_\_\_ )

Docket No. T-01051B-03-0668

**ESCHELON TELECOM OF ARIZONA, INC.'S  
MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

Eschelon Telecom of Arizona, Inc. ("Eschelon") filed this Complaint because Qwest Corporation ("Qwest") refused Eschelon's request to pay the same rate for an unbundled network element platform known as UNE-Star<sup>1</sup> as that paid by one of its

<sup>1</sup> The service at issue is known as UNE-E when applied to Eschelon, UNE-M when applied to McLeod or generically as UNE-Star. See Joint Statement of Undisputed Facts ("JSOF") ¶ 1. "UNE-Star is the general term used to refer to UNE-M and UNE-E." See Qwest Response to ESCH 01-003. Throughout this Brief, Eschelon will use the term UNE-Star.

competitors, McLeodUSA (“McLeod”). Eschelon is entitled to nondiscriminatory rates for UNE-Star pursuant to Section 252(i) of the Telecommunications Act of 1996 (the “Act”) (often known as the “opt-in” or “pick and choose” provision of the Act), pursuant to the nondiscrimination provisions of the Act, pursuant to Eschelon’s Interconnection Agreement with Qwest, and pursuant to state law. Qwest’s refusal to grant Eschelon opt-in request violates each of these, and therefore, Eschelon is entitled to judgment as a matter of law.<sup>2</sup>

## II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where, as here, there is no genuine issue as to any material fact. A motion for summary judgment may be granted when there are no material questions of fact, and based upon the undisputed material facts, the moving party is entitled to judgment as a matter of law. *See Ferree v. City of Yuma*, 124 Ariz. 225, 226, 603 P.2d 117, 118 (App. 1979). As set forth below, the material facts in this case are undisputed, and Eschelon is entitled to judgment as a matter of law.

## III. ARGUMENT.

### A. Eschelon Requested to Opt-In to the McLeod UNE-Star Rate for the Same Time Period That It Is Available to McLeod.

In an October 29, 2002 letter to Qwest, Eschelon requested to opt-in to the same UNE-Star rates as McLeod for the same period of time. *See JSOF* ¶ 11; JSOF, Exhibit A. The request was simple and direct: “Eschelon requests to opt-in to page 2 of the

---

<sup>2</sup> The Minnesota Public Utilities Commission recently ruled on the same issues that are the subject of this matter. A copy of the Order is set forth as Exhibit E to the JSOF.

1 amendment to Attachment 3.2 of the Qwest-McLeod Interconnection Agreement,  
2 consisting of Platform recurring rates that are effective from September 20, 2002, until  
3 December 31, 2003.”<sup>3</sup> See JSOF, Exhibit A.  
4

5 On November 8, 2002, Qwest responded, claiming that it was not required to  
6 honor Eschelon’s request because (i) the request did not include the same termination date  
7 and volume requirements as the McLeod agreement; and (ii) Eschelon’s agreement  
8 included terms not included in the McLeod agreement. See JSOF, Exhibit B. Thus, from  
9 the time of Eschelon’s initial request, Qwest has taken the position that Eschelon was not  
10 entitled to opt-in to the McLeod rate unless it also accepted the two terms in the McLeod  
11 Agreement that differ from the Eschelon agreement—the termination date and the volume  
12 requirements, and removed the amendments to the Eschelon agreement. Eschelon submits  
13 that the volume requirements and the termination date of the McLeod agreement are not  
14 legitimately related to the terms that Eschelon requested. Likewise, the amendments to the  
15 Eschelon agreement are not related to the lower McLeod rate.  
16  
17

18 **B. Eschelon Has the Right to "Pick and Choose" Selected Terms of the**  
19 **McLeod Agreement.**

20 Under Section 252(i) of the Act, Eschelon has the right to opt-in to provisions of  
21 McLeod’s UNE-Star agreement under the appropriate conditions. Furthermore, under the  
22

23  
24 <sup>3</sup> Qwest has asserted that Eschelon really made an opt-in request for the McLeod rate for  
25 the total term of Eschelon’s agreement. But that is clearly not the request made in  
26 Eschelon’s October 29, 2002 letter or in subsequent correspondence. For example, in a  
February 10, 2003 letter, Eschelon repeated its request stating: “Eschelon has asked that  
Qwest decrease our rates by the same amounts as McLeod’s rates were decreased, for the  
same period as McLeod.” (emphasis added) (attached as Exhibit 1 to this Motion).

1 Act, state law, and its Interconnection Agreement (ICA) with Qwest, Eschelon is entitled  
2 to nondiscriminatory rates, terms, and conditions. One avenue available to CLECs, such  
3 as Eschelon, to obtain nondiscriminatory rates is to “pick and choose” provisions from the  
4 interconnection agreements of other CLECs as provided in Section 252(i) of the Act.  
5 Indeed, according to the FCC, Section 252(i) is “a primary tool of the 1996 Act for  
6 preventing discrimination under section 251.” *In re Implementation of the Local*  
7 *Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499  
8 (1996) (“First Report and Order”), ¶1296.

11 Section 252(i) of the Act states:

12 A local exchange carrier shall make available any interconnection,  
13 service, or network element provided under an agreement approved  
14 under [section 252] to which it is a party to any other requesting  
15 telecommunications carrier upon the same terms and conditions as  
those provided in the agreement.

16 To implement this statute, the FCC promulgated 47 C.F.R. § 51.809, which provides, in  
17 relevant part:

18 An incumbent LEC shall make available without unreasonable delay  
19 to any requesting telecommunications carrier any individual  
20 interconnection, service, or network element arrangement contained  
21 in any agreement to which it is a party that is approved by a state  
22 commission pursuant to section 252 of the Act, upon the same rates,  
terms, and conditions as those provided in the agreement.

23 Section 252(i) acts as a most favored nation clause, allowing a carrier like Eschelon to opt-  
24 in to more advantageous terms and conditions negotiated by another carrier:

25 We further conclude that section 252(i) entitles all parties with  
26 interconnection agreements to “most favored nation” status regardless

of whether they include “most favored nation” clauses in their agreements. Congress’s command under section 252(i) was that parties may utilize any individual interconnection, service, or element in publicly filed interconnection agreements and incorporate it into the terms of their interconnection agreement. This means that any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission. We believe the approach we adopt will maximize competition by ensuring that carriers obtain access to terms and elements on a nondiscriminatory basis.

First Report and Order, ¶ 1316 (emphasis added).

ILECs, like Qwest, can only overcome the obligation to allow CLECs, like Eschelon, to pick and choose “where the incumbent proves to the state commission” that either the costs of providing the service to the requesting carrier (*i.e.*, Eschelon) are greater than the costs of providing it to the original carrier (*i.e.*, McLeod) or it is not technically feasible to provide the service to the requesting carrier. *See* 47 C.F.R. § 51.809(b). Neither of these exceptions applies here. Qwest has not alleged, and there is no basis to do so, that the costs of providing UNE-Star differ between Eschelon and McLeod. The second exception, technical infeasibility, is obviously not applicable here since Qwest is already providing UNE-Star to Eschelon.

**C. Eschelon Need Only Take Terms that Are Legitimately Related to the Terms Requested.**

Eschelon’s right to opt-in is admittedly not unlimited. Indeed, Eschelon must accept all terms that Qwest can prove are legitimately related to the term requested. As the Supreme Court stated in upholding the FCC “pick and choose” rule: “[T]he

1 Commission [FCC] has said that an incumbent LEC can require a requesting carrier to  
2 accept all terms that it can prove are 'legitimately related' to the desired term . . . . Section  
3 252(i) certainly demands no more than that." *AT&T Corp. v. Iowa Utilities Board*, 525  
4 U.S. 366, 396, 119 S. Ct. 721, 738 (1999).

6 A similar standard applies to a discrimination claim. Unreasonable discrimination  
7 under the Act is determined by considering: (1) whether the services are "like," (2) if so,  
8 whether the services were provided under different terms or conditions, and (3) whether  
9 any such difference was reasonable. *National Communications Ass'n, Inc. v. AT&T Corp.*,  
10 238 F.3d 124, 127 (2<sup>nd</sup> Cir. 2001) In that respect, the courts have recognized that because  
11 two services are "like," such that they shared a "functional similarity," there was "good  
12 cause to suspect that there was little justification for [a] large difference in the rates  
13 charged[.]" *Id.* at 130 (quoting *Western Union Int'l, Inc. v. FCC*, 568 F.2d 1012, 1017-18  
14 & n.11 (2d Cir. 1977) (internal quotations omitted)); *cf. American Tel. & Tel. Co. v.*  
15 *Central Office Tel., Inc.*, 524 U.S. 214, 223, 118 S.Ct. 1956, 1962 (1998) ("[T]he policy of  
16 non-discriminatory rates is violated when similarly situated customers pay different rates  
17 for the same services. It is that antidiscriminatory policy which lies at the heart of the  
18 Communications Act.").

22 Thus, under a 252(i) analysis, a discrimination analysis, or an ICA analysis, the  
23 question to be answered is the same: whether the differences between McLeod's UNE-  
24 Star and Eschelon's UNE-Star are related to, and therefore justify the difference in, the  
25 prices charged. The clear answer is no.

**D. The Burden of Proof is on Qwest to Prove that any Additional Terms Demanded Are Legitimately Related to the Terms Requested.**

The burden of proving that additional terms are legitimately related to the terms requested falls on Qwest. As the FCC has stated:

Given the primary purpose of section 252(i) of preventing discrimination, we require incumbent LECs seeking to require a third party to agree to certain terms and conditions to exercise its rights under section 252(i) to prove to the state commission that the terms and conditions were legitimately related to the purchase of the individual element being sought.

First Report and Order, ¶ 1315 (emphasis added). ILECs, such as Qwest, “must prove with specificity” that such terms and conditions are legitimately related. First Report and Order, ¶ 1437 (emphasis added).

Likewise, the Fifth Circuit responded to an argument by Southwestern Bell that a CLEC could only opt into the provisions of an existing agreement if the CLEC seeks no additions or changes to that agreement, by ruling that an ILEC can only require it to “accept all terms that [the ILEC] can prove are legitimately related to the desired term.” *Southwestern Bell Telephone Co. v. Waller Creek Communications, Inc.*, 221 F.3d 812, 818 (5<sup>th</sup> Cir. 2000) (quoting *AT&T Corp.*, 525 U.S. at 396). Qwest has not met, and cannot meet, this burden.

**E. Qwest Has Not Shown that the Termination Date and Volume Requirements Have Any Legitimate Relationship to the Difference in Rates.**

A comparison of the original UNE-Star agreements demonstrates that neither the termination date nor the volume requirements are related to the reduced UNE-Star rate.

1 Eschelon and McLeod entered into UNE-Star agreements within 45 days of each other in  
2 2000. *See* JSOF ¶¶ 3, 4; Complaint, Exhibits 2, 3. The agreements were virtually  
3 identical with the exception of the two items in question: the termination date and volume.  
4 The McLeod agreement expired on December 31, 2003; the Eschelon agreement expired  
5 on December 31, 2005. *See id.* McLeod committed to purchase at least 275,000 local  
6 exchange lines per year, while Eschelon committed to purchase at least 50,000 access lines  
7 per year. *See* JSOF ¶ 9; Complaint, Exhibits 2, 3. Yet, the rates in the two agreements  
8 were identical. *See* JSOF ¶¶ 3, 4; Complaint, Exhibits 2, 3  
9  
10

11 In September 2002, McLeod and Qwest entered into an amendment of their UNE-  
12 Star Agreement. *See* JSOF ¶ 10; Complaint, Exhibit 5. That Amendment reduced the  
13 pricing of UNE-Star to McLeod without changing these two terms (or any other terms for  
14 that matter). *See* Complaint, Exhibit 5. The McLeod UNE-Star agreement termination  
15 date remained December 31, 2003, the volume commitments did not change, and nothing  
16 else in the McLeod agreement changed. *See* Complaint, Exhibit 5. However, the rate was  
17 reduced dramatically, indicating little, if any, relationship between these terms and the rate  
18 reduction.  
19  
20

21 Furthermore, even if the termination date had some relevance, Eschelon requested  
22 to take the McLeod rate for exactly the same term as McLeod—September 20, 2002  
23 through December 31, 2003. *See* JSOF, Exhibit A. After that date, Eschelon's rate would  
24 revert back to the higher rate until the termination date of December 31, 2005. Thus,  
25 Eschelon did take the related term—the exact same time period for which the reduced rate  
26



1 is available to McLeod. It is the term of the reduced rate that is relevant to the rate, not the  
2 different termination dates of the two agreements.

3 **F. Other Differences in the Agreements Are Also Not Related to the Rate**  
4 **Difference.**

5 In addition to the termination dates and volume requirements, Qwest has claimed  
6 that two amendments to the Eschelon agreement distinguish the two agreements and  
7 justify its refusal to honor Eschelon's opt-in request. In effect, Qwest is claiming that the  
8 existence of these terms in the Eschelon agreement are somehow legitimately related to  
9 the reduced rate that McLeod will pay from September 20, 2002 to December 31, 2003.  
10

11 This argument fails for two reasons: 1) the Act does not require Eschelon to jettison  
12 provisions in its already existing agreement in order to pick and choose terms from  
13 another, and 2) there is no proof that these differences have any relationship the rate  
14 differential between the agreements.  
15

16 Eschelon is seeking to opt-in to the McLeod agreement's rates for UNE-Star, not  
17 the other way around. Therefore, the relevant question is not what terms Eschelon has in  
18 its agreement, but rather what terms McLeod has in its agreement. As the FCC has stated,  
19 an incumbent LEC, like Qwest, can require a requesting carrier, like Eschelon, to accept  
20 all terms from the requested agreement that are legitimately related to the desired term.  
21 See First Report and Order, ¶ 1315. Qwest cannot use the additional terms in the Eschelon  
22 agreement to prevent Eschelon from opting in to the McLeod UNE-Star rate.  
23  
24  
25  
26

1 In addition, there is nothing about these amendments that relate to the rate reduction  
2 given to McLeod but not Eschelon. While it is correct that Eschelon has agreed to  
3 amendments that McLeod has not, those amendments have no relation to the difference in  
4 the rates. Those amendments relate to non-recurring charges or additional recurring  
5 charges that Eschelon would continue to pay after the opt-in. *See* JSOF ¶¶ 5, 7. Eschelon  
6 is not asking to obtain additional services from the McLeod UNE-Star amendment.  
7 Rather, it is simply asking to pay the same rate as McLeod for UNE-Star as well as the  
8 additional charges attributable to its amendment.  
9  
10

11 The differences cited by Qwest, and Eschelon's response to each, are as follows.  
12 First, Eschelon has an amendment that provides for the non-recurring charges for UNE-  
13 Star which McLeod does not. The purpose of the amendment, as explicitly stated in the  
14 amendment, was to "establish the Non-recurring charges for Unbundled Network Element  
15 Platform ("UNE-P")." *See* JSOF ¶ 7; JSOF, Exhibit F. No changes were made in this  
16 amendment to the monthly recurring charges that are the subject of Eschelon's opt-in  
17 request. *See id.* This amendment includes a provision for CCMS (Custom Call  
18 Management System) that is provided under those non-recurring charges. *See id.* Nothing  
19 about Eschelon's opt-in request would affect these charges. More to the point, nothing  
20 about this amendment to Eschelon's agreement has anything to do with McLeod's rate  
21 reduction.  
22  
23  
24

25 A second amendment to the Eschelon agreement provides Eschelon with the right  
26 to purchase AIN features at retail rates in conjunction with UNE-Star. *See* JSOF ¶ 5,

1 Complaint, Exhibit 4. In exchange for the ability to obtain certain features, Eschelon's  
2 recurring rates were increased by \$0.35 per line, per month, a rate designed specifically for  
3 Eschelon in light of its pattern of feature usage. *See id.* This additional charge is assessed  
4 to each line whether or not the additional features are ordered with that line. Qwest admits  
5 that there are no features provided to Eschelon under this amendment that are not also  
6 provided to McLeod. *See* JSOF ¶ 6; Qwest Response to ESCH 02-001. Therefore,  
7 Eschelon obtains nothing different than McLeod under this amendment. It simply obtains  
8 the features in question at a uniform flat rate of \$0.35 per line per month. Thus, this  
9 additional charge pays for the availability of these features and has no relationship with the  
10 remaining rate difference between Eschelon and McLeod. As such, it provides no  
11 justification for the difference in rates nor is it related to that rate difference.  
12

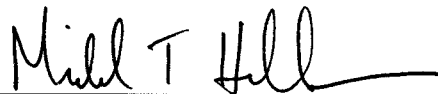
## 13 VI. CONCLUSION

14  
15 Eschelon and McLeod both purchase UNE-Star pursuant to their Interconnection  
16 Agreements. However, Qwest charges Eschelon a higher rate for UNE-Star than it  
17 charges McLeod. The terms that Qwest demanded that Eschelon take from the McLeod  
18 agreement are not legitimately related to the terms requested. The amendments to the  
19 Eschelon agreement are also not related to the difference in rates for the period in  
20 question. Therefore, the difference in rates for this service is rate discrimination, which is  
21 prohibited by the Telecommunications Act of 1996, state law and Eschelon's  
22 Interconnection Agreement.  
23  
24  
25  
26

1 Accordingly, Eschelon is entitled to the same rate as McLeod for UNE-Star for the  
2 same time period as McLeod, and the Commission should order Qwest to provide UNE-  
3 Star to Eschelon at that same rate, effective September 20, 2002 and until December 31,  
4 2003.

5  
6 DATED this 10<sup>th</sup> day of December, 2003.

7 LEWIS AND ROCA LLP

8  
9  
10 

11 Thomas H. Campbell  
12 Michael T. Hallam  
13 40 N. Central Avenue  
14 Phoenix, Arizona 85004

15 Attorneys for Eschelon Telecom of Arizona, Inc.

16 ORIGINAL and thirteen (13) copies  
17 of the foregoing filed this 10<sup>th</sup> day of  
18 December, 2003, with:

19 The Arizona Corporation Commission  
20 Utilities Division – Docket Control  
21 1200 W. Washington Street  
22 Phoenix, Arizona 85007

23 COPIES of the foregoing  
24 hand-delivered this 10<sup>th</sup> day of  
25 December, 2003, to:

26 Jane Rodda, Administrative Law Judge  
Hearing Division  
Arizona Corporation Commission  
1200 W. Washington Street  
Phoenix, Arizona 85007

LEWIS  
AND  
ROCA  
LLP  
LAWYERS

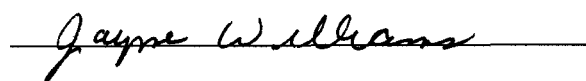
1 Maureen Scott, Legal Division  
2 Arizona Corporation Commission  
3 1200 W. Washington Street  
4 Phoenix, Arizona 85007

5 Ernest G. Johnson, Director  
6 Utilities Division  
7 Arizona Corporation Commission  
8 1200 W. Washington Street  
9 Phoenix, Arizona 85007

10 COPY of the foregoing mailed  
11 This 10th day of December, 2003, to:

12 Timothy Berg  
13 Theresa Dwyer  
14 Fennemore Craig, P.C.  
15 3003 N. Central Avenue  
16 Suite 2600  
17 Phoenix, Arizona 85012

18 Todd L. Lundy  
19 Qwest Corporation  
20 1801 California Street  
21 Suite 4900  
22 Denver, CO 80202

23  
24  
25  
26  


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**EXHIBIT 1**



February 10, 2003

Ms. Patricia A. Engels  
Executive Vice President  
Wholesale Markets  
Qwest Communications  
1801 California Street, 52<sup>nd</sup> Floor  
Denver, Colorado 80202

Via Airborne Express

Re: Significant Issues in Eschelon's Relationship with Qwest

Dear Pat:

I am writing to follow up on my commitment to you from our meeting last month on January 8, 2003. We agreed that I would put together a list of significant issues in our relationship with Qwest as its second largest CLEC, making \$40 million annualized wholesale purchases. I promised to briefly outline the issues, propose my thoughts on how best to resolve them, and then allow you up to sixty days to resolve the issues.

Eschelon's list of issues will be of no surprise to anyone at Qwest who is familiar with our account. We have raised each issue many times and at many different levels within Qwest. As a newcomer now leading Qwest's wholesale services division, I understand that these issues will likely be new to you. However, your predecessors have been well aware of them and have not resolved them. I write this to give you the opportunity that you asked for to resolve these issues within the sixty-day time frame upon which we agreed.

1. **WorldCom EEL Agreement Opt-in and Refund** - From March 2000 through October 2001, Eschelon purchased 113 special access circuits in Minnesota primarily from Qwest's Minnesota Private Line Tariff and FCC Tariff, but we also purchased circuits in several other states as well. Under Eschelon's Interconnection Agreements with Qwest, Eschelon is entitled to UNE combinations, including EELs. However, Qwest refused to provide a process under our ICA for Eschelon to order EELs and instructed Eschelon to order EELs as special access circuits. Qwest required Eschelon to pay tariffed, as opposed to UNE rates, for these combinations.

Qwest has refused Eschelon's request to re-price the special access circuits as EELs, and refund the overpaid amounts. Eschelon has calculated that from March

730 Second Avenue South • Suite 1200 • Minneapolis, MN 55402 • Voice (612) 376-4400 • Facsimile (6

Exhibit B-5

**voice data internet equipment**

Ms. Patricia A. Engels  
February 10, 2003  
Page 2

— 2000 through April 30, 2002, we were billed and we paid \$839,671 for the 113 Minnesota circuits. Had Eschelon been able to order EELs during this time, we would have only had to pay \$307,446, which is \$532,225 less than what we actually paid.

Qwest settled exactly the same issue with MCI WorldCom Network Services (WorldCom) under a Confidential Billing Settlement Agreement dated June 29, 2001. WorldCom claimed that approximately 2,500 private line circuits provided by Qwest to WorldCom in various states should have been converted to the Unbundled Network Element Platform known as EEL from tariffed services during the time period between September 4, 1997 through the date of the agreement. WorldCom was required to convert its private lines to EELs as part of the agreement and the parties agreed to a payment made by Qwest for past services billed. Eschelon has since also converted its private line circuits in April 2002.

On October 9, 2002, Eschelon asked Todd Lundy of Qwest whether Qwest would allow Eschelon to opt-in to provisions of an EEL agreement that were made available to WorldCom but not to Eschelon. Mr. Lundy has never responded to Eschelon's request. We have also made the request repeatedly through our Qwest service manager, Jean Novak, but have not received an answer.

Eschelon has the same Interconnection Agreement as WorldCom. Eschelon is likewise entitled to combinations under that agreement. Qwest agreed to provide WorldCom with a payment as to this issue. Eschelon's identical dispute with Qwest should also result in Qwest's payment of the difference between the price Eschelon paid for these lines and the price it should have paid had Qwest provided Eschelon with combinations (i.e., EELs), as required by the parties' Interconnection Agreements

Eschelon is requesting a refund of \$532,225 for Minnesota, and the appropriate amount for the other states, for the difference in price between Qwest's tariffed rates billed and paid by Eschelon and Eschelon's Interconnection Agreement rates for elements that make up an EEL. The calculation for Minnesota is attached in Document 1.

2. Analysis of PAP Impact to Eschelon – In order for Eschelon to make an informed business decision as to whether to opt into Qwest's Performance Assurance Plan ("PAP") in each state in which Eschelon operates, Eschelon has asked Qwest to provide the calculations of what payments Eschelon would have received for prior periods had the PAP been effective. On December 6, 2002, Eschelon made a written request to Qwest for this information. Jean Novak of Qwest responded that Qwest will not provide this information to Eschelon. Since then, Eschelon has requested the information through various other contacts at Qwest. We finally received the Minnesota PAP information from Qwest attorney Jason Topp through formal discovery in a Minnesota proceeding, but we have yet



to receive additional documents that will allow us to understand the Minnesota PAP information. And we have received no PAP information for any other state.

Although Qwest has answered information requests from regulatory authorities concerning PAP results, and consequently must have generated this information for Eschelon as well as other CLECs, Qwest has not responded to Eschelon's requests.

Eschelon again requests that Qwest provide the PAP payment calculation specifically for Eschelon's experience (not all state/CLEC results) for a meaningful interval of time. The calculation must be broken out by month and by state and Qwest must advise what months are covered. Eschelon would prefer getting these calculated results for the period October, November and December, 2002. Because Qwest already compiles this information, and you indicated to me at the January 8<sup>th</sup> meeting that you would look into this, Qwest should be able to provide it to us very quickly.

3. **Service Level Improvement** – When we met, I gave you a copy of the Eschelon Report Card. Eschelon provides its Report Card to Jean Novak and the service management team at Qwest every month. When problems arise, Qwest also routinely asks Eschelon for examples. The Report Card represents a set of highly organized examples, including detailed back-up information. It also represents your customer's view of the level of service Qwest is providing. In the November 2002 Report Card, for example, of 18 measures, Qwest received an "unsatisfactory" for 12 and a "satisfactory" for 6 of the measures. Over the six-month period from June 2002 to November 2002, Qwest met satisfactory performance levels only 35% of the time. We request that Qwest present a plan to raise these performance levels to satisfactory, for all categories. We also request that Qwest provide assurances that the level of resources that have been committed to escalations, the QCCC, CMP, and service issues while 271 proceedings are pending, will not be reduced once those proceedings end. Backsliding penalties do not protect a CLEC from harm to its reputation when service problems occur; we require that the problems be avoided in the first place.

Among our Report Card issues is that we continue to experience far greater numbers of major network outages caused by Qwest than is reasonably acceptable. From January 2001 through December 2002, Eschelon has experienced 105 Qwest-caused major network outages. Eschelon has experienced 59 outages of its Qwest DS3 circuits alone. These outages harm both Eschelon and our customers. Eschelon requests that Qwest conduct root cause analysis of its outages, take appropriate steps to prevent future outages, and provide Eschelon with reasonable compensation for these disruptions.

4. **Billing Accuracy** – Qwest's billing accuracy in 2002 deteriorated. Eschelon disputed approximately \$4.0 million in charges billed by Qwest for numerous

reasons. This amount equates to roughly 15% of what Qwest invoiced during the calendar year 2002. In addition, Qwest wrongfully bills Eschelon non-current charges for a variety of items; most recently, the Utah collocation charges, discussed below. Eschelon's outstanding unresolved billing disputes with Qwest total approximately \$3.2million for the period ending December 2002. Qwest's overbilling practices and slow dispute resolution procedures require Eschelon to expend large amounts of time and resources to determine and/or verify amounts actually owed. Qwest's practices require Eschelon to meticulously review each bill, a process that takes 60 to 90 days to complete, and which imposes significant costs upon us.

Qwest's bills to Eschelon should be current and accurate, but when it fails these simple objectives, Qwest should provide accurate and detailed credit notices so that Eschelon can reconcile billing credits with the disputed items. Today, Qwest typically lumps all billing credits on an invoice with no description as to what the credits apply. In addition, Qwest often provides billing credits on invoices other than those that contained the disputed items. We request that in the next 60 days, Qwest investigate all 2002 and prior outstanding disputes, make appropriate credits to our invoices, and correct the billing practices that result in these numerous disputes.

Eschelon also requests that Qwest reimburse us for the extraordinary amount of personnel time that Eschelon must expend in auditing Qwest's bills. If Qwest improved its billing accuracy to the 98% level, Eschelon would save \$130,000 annually in staffing costs. By billing inaccurately, Qwest imposes these auditing costs upon Eschelon.

Additionally, Eschelon requests that Qwest agree to revisit its Performance Indicator Definitions ("PIDs") relating to billing accuracy in the Long Term PID Administration sessions. The billing accuracy measures should be revised to change the definitions and limit the exclusions so that the measures more accurately capture billing problems experienced by Eschelon. The revised measures should also be included in the PAP.

Eschelon also disagrees with Qwest billing retroactive monthly recurring charges back to November 2000 for services it never billed Eschelon until this last invoice, dated December 7th, 2002. Eschelon requests that Qwest adjust and reissue these invoices to reflect the correct amounts due.

5. **UNE-E Mechanization/Conversion** – One hundred percent of the bills for UNE-E<sup>1</sup> are inaccurate. Unlike UNE-P, this product is still ordered, provisioned, and

---

<sup>1</sup> "UNE-E" has been the name Qwest and Eschelon have used to refer to the platform product that Qwest made available to Eschelon under an interconnection agreement amendment executed on November 15, 2000.

billed as resale. Under our contract, billing should have been mechanized and Eschelon should be receiving bills at the UNE-E rates as opposed to resale rates. After executing the contract, Qwest stated that billing would be mechanized and the correct rates would be billed beginning at some point during the first quarter of 2001. However, Qwest still has not fulfilled its commitment to convert to accurate billing. In the July 2002 Arizona 271 workshop, Qwest said that it was working on solutions to deliver accurate bills and that it believed it could provide accurate UNE-E bills by the end of this year. It has not done so. Despite two years of promised mechanization, the process is still highly manual.

Although Qwest had said that the changes to the base of customers would be record-only work, Qwest revealed after the workshop that it will use a manual process to attempt to avoid switch work and facility changes. Unless Qwest's typists remember to manually add certain information to the orders, the orders will automatically go to the switch and/or facility assignments. No one will be prepared for this to happen, and end-users' service will be negatively affected. This is not the process that Qwest stated, over a period of many months, that it had been developing, and it does not meet Qwest's commitment to avoid adverse customer impact with a transparent conversion. The proposal also imposes a resource burden on Eschelon for work that Qwest committed to do. Eschelon asks Qwest to honor the commitments it had made at the beginning of this contract, and provide accurate billing for UNE-E, and refund the \$4.0 million Eschelon paid to convert its resale lines to UNE-E.<sup>2</sup>

6. Qwest Should Give Eschelon the Same Rates for "UNE-Star"<sup>3</sup> that Qwest Agreed to Give McLeod - In September 2002, McLeod and Qwest entered into an amendment to their interconnection agreement that provided for lower rates for UNE-M (McLeod). Eschelon and Qwest entered into a similar agreement; however, Qwest has refused to lower our rates. Eschelon has asked that Qwest decrease our rates by the same amounts as McLeod's rates were decreased, for the same period as McLeod. Qwest has refused, stating that Eschelon must take the same volume requirements, service limitations and termination date as they appear in the McLeod agreement to get the same rates.

Qwest argues that the volume, service and termination provisions are integrally related to the price reduction. This, however, is simply not true. Under the Eschelon and McLeod UNE-Star agreements, Eschelon and McLeod were getting the same rates despite the differences in the contracts. The differences upon which Qwest relies in the Eschelon and McLeod contracts did not change from

<sup>2</sup> Section 2.1 of Qwest and Eschelon's Interconnection Agreement Amendment, executed on November 15, 2000, required Eschelon to "pay Qwest \$10million to convert to the Platform [UNE-E] and to be released from any termination liabilities associated with Eschelon's existing contracts for resold services with Qwest." Eschelon's termination liabilities were \$6 million of the \$10 million total.

<sup>3</sup> "UNE-Star" has been Qwest's internal name for a UNE Platform product that has also been called "UNE-E" when provided to Eschelon and "UNE-M" when provided to McLeod. It is resale at contract rates.

2000 to 2002. If they were related to the new rates, they would have changed as well in 2002. For example, if McLeod's new rates were based on volume, the volume commitments would have gone up when the rates went down. But, only the McLeod rates changed in 2002, the volume requirements, service limitations and termination date did not. The UNE-E (Eschelon) and UNE-M (McLeod) rates were identical in 2000, and under Eschelon's request, the rates would also be identical now. Eschelon requests that Qwest agree to an amendment that would once again give Eschelon the same rates as McLeod for UNE-E (Eschelon). Qwest should change our UNE-Star pricing retroactively to September 2002, and issue a credit of \$150,000 for the overpaid amounts, through January 2003. This request has been previously made to Richard Corbetta and Larry Christensen at Qwest, yet no action has been taken by Qwest.

7. **SS7 Reciprocal Charges** – Qwest charges Eschelon approximately \$35,000 per month for use of Qwest's SS7 signaling network for all interstate calls, and in Colorado, for all calls – both interstate and intrastate. Qwest began this practice in 2001 by unbundling its access tariffs and removing the cost recovery for SS7. Qwest then reduced its access rates to interexchange carriers, and shifted the burden of SS7 costs to local exchange carriers and their agents.

Through its agent, Illuminet, Eschelon provides SS7 signaling to Qwest. Every call between Eschelon end-users and Qwest end-users requires that the companies' respective SS7 signaling networks work together. At present, Qwest is charging Eschelon's agent for using Qwest's SS7 and denying Eschelon similar compensation for Qwest's use of Eschelon's SS7 signaling. We raised this issue with Qwest's former Vice President for Wholesale Services, and she took no action to resolve this issue.

If Qwest agrees to a reciprocal compensation agreement where Qwest no longer bills Eschelon, or Eschelon's agent, for SS7 message charges, then Eschelon will not begin billing Qwest for SS7 message charges. Because Qwest, to date, has not agreed to a reciprocal compensation arrangement for SS7, Eschelon will begin billing Qwest the same amount of charges that Qwest bills Eschelon. The attached Document 2 details Q4 charges incurred by Eschelon for SS7 messages billed to Eschelon's agent and passed on to Eschelon.

8. **Carrier Access Billing Records** – Qwest is not providing all of Eschelon's call records for billing carrier access charges. Eschelon has performed three audits over the past three years, including one audit that was jointly performed by Qwest and Eschelon. In each of these audits, Eschelon has proven that Qwest is not providing all records, including records from meet point billing (terminating on-net access) and daily usage files (DUF) for UNE-E and UNE-P access lines. The parties settled their differences on March 1, 2002 for periods prior to March 1, 2002. However, as shown by our most recent audit, Qwest continues to fail to provide records for approximately 20% of qualifying calls.

In the attached Document 3, Eschelon summarizes where both parties are regarding reconciling the latest test call audit that started in May 2002. Thus far, Qwest has admitted that at least 3.4% of the test calls were not provided to Eschelon (149 calls out of 4,362). Eschelon believes that the number of missing calls still unaccounted for is 20.6%, or 898 call records missing. Qwest has not provided any proof that it, in fact, located the calls in question. Qwest has failed to prove that these calls should not generate an access record.

Based on the missing call record minutes and the types of calls missing from the test call audit, and applying Eschelon's interstate and intrastate access rates, Eschelon calculates that Qwest is failing to provide approximately \$0.79 per access line equivalent per month in access records. Since March, 2002, this amounts to \$898,266 of revenue that Qwest has caused Eschelon to forego. The attached Document 4 reflects this calculation.

Eschelon requests that Qwest fix its systems to provide 100% of the access records for calls made from and to Eschelon UNE-L, UNE-E (Eschelon) and UNE-P lines. Eschelon also requests that Qwest provide a copy of a document, entitled "Access Billing Supplier Quality Certification Operating Agreement", that is referenced in our Interconnection Agreements but has not been supplied to us. If Qwest wishes to conduct an audit of its access records system, at Qwest's, then Eschelon will be happy to cooperate in that audit.

Lastly, Eschelon requests reimbursement for approximately \$195,000 we have incurred through January 2002 related to the CABs test call audit that occurred in April/May 2002.

9. **Loss and Completion Reports** – Qwest needs to promptly notify Eschelon when a customer has returned to Qwest or moved to another CLEC. Particularly when Qwest's switch is used to serve the customer, either through resale/UNE-E or UNE-P, such departures are not readily known to the CLEC experiencing the customer loss. Qwest's failure to notify Eschelon of customer loss harms Eschelon in many ways, because we do not know an account has left our service. Eschelon has spent a significant amount of time working with Qwest to gain improvements in Qwest's loss and completion reporting. However, problems still remain. In addition, conversations with other CLECs lead us to believe that additional line loss problems occur when using EDI, and we are moving to EDI. In addition to continuing to work on these issues, Eschelon asks Qwest to agree to jointly develop with CLECs a performance measure (a PID) for line loss. Missing, as well as inaccurate or incomplete, line loss reports should be captured by the measure, and the measure should be included in the PAP.

10. DSL Discount - Beginning in August 2001, Qwest finally made available to Eschelon a process for ordering Qwest DSL, which Qwest had committed to do in November 2000. From November 2000 until August 2001, Eschelon had to order DSL service from Covad at a higher price than our contract price with Qwest. Eschelon requests reimbursement of these additional costs, as described in Document 5. Qwest can elect whether to pay our higher Covad costs for the entire term of our five year agreement, totaling \$1,056,988; or Qwest can reimburse our costs of cover to this point plus our installation charges and internal provisioning costs for converting our Covad DSL lines to Qwest, totaling \$499,044.

Eschelon has been successful in generating additional revenue for Qwest by selling over 7,700 Qwest DSL access line equivalents, or approximately 1,900 customers subscribing to Qwest DSL. Given the sizeable volume of business, Eschelon requested that Qwest provide a DSL volume discount schedule. Qwest continues to make a volume discount available to resellers only after they have 15,000 DSL customers. Eschelon believes that Microsoft's MSN division is the only entity that receives a discount under Qwest's current plan. Other RBOCs, such as Verizon, provide DSL discount structure with discounts beginning at 2,500 DSL units. Eschelon requests that Qwest set up a similar discount structure to Verizon's and end its discriminatory discount practices. Additional DSL sales will benefit both Qwest and Eschelon. The attached Document 6 reflects the volume discount structure Eschelon is asking Qwest to develop.

#### 11. Collocation True Up Refunds in Minnesota and Utah

A. Minnesota Issue - Eschelon was overcharged for collocation non-recurring rates when Eschelon built its collocations in 1999 and 2000 in the state of Minnesota. Eschelon believes it is due a refund from Qwest. Last year, the Minnesota Public Utility Commission, in Docket No. P-421/C-01-1896, ordered Qwest to issue a refund to Onvoy for the same reasons Eschelon is now asking Qwest to provide Eschelon a refund for overcharges.

In the Commission's May 3, 1999, Order Resolving Cost Methodology, Requiring Compliance Filing, and Initiating Deaveraging Proceeding, the MN Commission clearly stated that collocation prices are to be set following the AT&T/MCI collocation cost model (CCM) with a few exceptions. The Commission authorized US West to price only four services using US West's cost model (Fiber Splicing; Essential AC Power; Essential AC Power Feed, and Composite Clock) in a later order issued on March 15, 2000.

Eschelon was billed and has paid \$540,378 for 20 amp and 40-amp power delivery. Qwest should have used the AT&T / MCI collocation cost model, which would have resulted in non-recurring charges of only \$14,839. Therefore,

Eschelon is requesting Qwest to issue Eschelon a refund in the amount of \$525,539. See attached Document 7 for this calculation.

Eschelon also requests that Qwest audit Eschelon monthly recurring charges invoiced during the past two years to ensure that the rates billed were consistent with the outputs of the AT&T / MCI collocation cost model. Any MRC overcharges that Qwest uncovers should be refunded to Eschelon as well. Eschelon should be notified in advance of any discrepancy Qwest finds prior to changing Eschelon's invoices and applying any credit and/or debit adjustments.

B. Utah Issue – Eschelon noticed a large true-up in the amount of \$30,322 on our 801 R59-0004 004 December 7, 2002 invoice. In addition, in January 2003, Eschelon received more non-recurring charge collocation invoices that included additional charges in the amount of \$38,526. Eschelon believes that the calculations made by Qwest are incorrect. The attached Document 8 shows that Eschelon is owed \$243,015 for its original collocation orders and Eschelon owes Qwest \$60,799 for the augment orders. The net amount is that Qwest owes Eschelon \$182,216. Thus far, however, Qwest has presented Eschelon invoices that show true-up charges in the amount of \$68,848.

12. Maintenance & Repair Charge – Eschelon has been disputing certain maintenance and repair charges billed by Qwest. The outstanding balance of these disputes, through December 2002, amount to \$70,937. The reasons documented when initiating these disputes are either: (1) the billed rates have not been approved by State Commissions; (2) the charges are not valid as the trouble was found in Qwest's network; (3) the charges are quite old – meaning that Qwest billed for the service later than what they have told the FCC that they would bill (no later than 45 days).

A solution to resolving these disputes would be for Eschelon and Qwest establish a reciprocal arrangement where Qwest ceases billing Eschelon these charges and Eschelon doesn't begin billing Qwest for maintenance and repair, or trouble isolation charges, when the trouble is found in Qwest's network.

13. Minnesota Direct Measures of Quality (DMOQ) Payments – Beginning in March 2002, Eschelon was again eligible to receive billing DMOQ payments from Qwest per Eschelon's Interconnection Agreement, Attachment 11, as implemented in our stipulation with Qwest. Eschelon delivered several DMOQ invoices to Qwest during 2002, but was unable to present invoices for all months. Qwest never made the DMOQ calculations or issued DMOQ credits on its own. The attached Document 9 includes the calculations that Eschelon has made for the period March through November 2002. The document shows that Qwest owes Eschelon \$180,002 after deducting for credits Eschelon has been able to validate as received from Qwest through January 2003.

Qwest is disputing a significant amount of the DMOQ credits Eschelon is calculating because Qwest claims it is billing accurate UNE-E invoices. Eschelon disagrees because the UNE-E invoices are still billing resale rates. Eschelon requests that Qwest come current on its DMOQ credits it owes Eschelon and issue a billing credit in the amount of \$180,002 on its February 2003 dated invoice(s).

14. **Disruptive Profile Changes Without Notice** - Eschelon has previously complained about Qwest's practice of unilaterally making changes to rates and profiles without adequate notice to Eschelon. I personally objected to this practice at CMP meetings I attended. Sometimes Eschelon only finds out about these changes when Qwest disrupts the provisioning process. This happened again in January, and the problem remains unresolved. Eschelon has ordered DS1 capable loops in Oregon since Spring of 2000. Although Eschelon believed that its interconnection agreement with Qwest allowed it to do so, Qwest insisted that Eschelon sign an amendment before it could order these loops. Eschelon had to sign the amendment in April of 2000. Since then, Eschelon has used the ordering process dictated by Qwest to order these loops. Suddenly, with no notice to Eschelon, Qwest stopped accepting orders from Eschelon through IMA in Oregon. On January 21, 2003, when the Eschelon provisioners ordered the loops using the normal process, they encountered a Qwest up-front edit that stopped the order from going through. When they escalated the issue, Qwest said that Eschelon did not have a right to these loops under its contract. We are still trying to sort out what Qwest means by this. Eschelon then began to submit its orders by facsimile. Eschelon is still investigating the facts and may not be able to wait sixty days to bring a complaint on this particular issue.

In these cases, Qwest obviously makes an internal decision about contract interpretation in advance of doing systems work (such as the up front edit in this case). When the decision is made, Qwest should pick up the phone and call us to discuss the issue. If there is a dispute about the contract terms, we can resolve it or get a commission to do so without disrupting the provisioning process. If Qwest is correct, the rate issue can be resolved with a bill credit. Instead, Qwest uses its power over the provisioning and billing process to unilaterally impose its interpretation and leaves us to dispute it. This is no way to treat a customer. You need to change this process.

Eschelon plans to work with Qwest in an open environment. To the extent issues affect other CLECs, Eschelon is willing to participate in collaborative efforts to resolve those issues in a timely manner. If agreements are reached and one party believes that certain information is confidential and the other does not, Qwest can file the information under seal with a request for commission rulings on the confidentiality issue. We need to work openly to resolve business issues in as straightforward a manner as we can.



Ms. Patricia A. Engels

February 10, 2003

Page 11

Your prompt attention to the issues presented herein will be greatly appreciated. Please do not hesitate to contact me if you have questions or need additional information about any of these issues.

Sincerely,

 2/10/03

Richard A. Smith  
President & Chief Operating Officer  
Eschelon Telecom, Inc.  
612.436.6626

Enclosures

cc (w. enc.): John Stanoch, Qwest  
Toni Dubuque, Qwest  
Jean Novak, Qwest  
Richard Busch, Miller Nash